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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887. 8

No. ~~293~~. 34.

HOWARD S. LOVEJOY ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 18, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 19, 1887.

1 Pleas before the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district, at the term of January, A. D. 1885.

Be it remembered that on the 20th day of February, 1884, a petition was filed in the office of clerk of said circuit court, which said petition is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska, *ss:*

THE UNITED STATES OF AMERICA

vs.

HOWARD S. LOVEJOY, JOHN MURPHY, GEORGE W. WINDERS, JOSEPH Lewellen, David Croissart, Charles A. Oesligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Richard W. Williamson, Samuel W. Hayes, Alfred Bigelow, Fitz M. Sackett, Jacob Bausman, Jeptha Hopkins,
2 John H. Cowan, Benarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenk, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, Hugh G. Clark, Defendants.

The United States of America, by G. M. Lambertson, its attorney, complaining of the above-named defendants, says that heretofore, to wit, on and about the first day of July, A. D. 1880, the said defendants, Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Lewellen, David Croissart, Charles A. Oesligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Richard W. Williamson, Samuel W. Hayes, Alfred Bigelow, Fitz M. Sackett, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Benarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenk, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, and Hugh G. Clark, made and executed and delivered to the United States
3 their certain bond and writing obligatory, by the terms whereof they bound themselves in the full and just sum of $50,000.00 in the current money of the United States, and for the payment thereof, well and truly to be made, they bound themselves, jointly and severally, their joint and several heirs, executors, and administrators. The said bond had the following condition:

The condition of the foregoing obligation is such that whereas the President of the United States hath, pursuant to law, appointed the said H. S. Lovejoy to be receiver of public moneys for the district of lands subject to sale at Niobrara, Nebraska, by commission dated April 28th, 1880, now, therefore, if the said H. S. Lovejoy has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void; otherwise it shall abide and remain in full force and virtue.

4 The said bond is hereto attached, marked "Exhibit A," and made a part hereof.

Plaintiff alleges, as a breach of said bond, that said Howard S. Lovejoy, on or about the 1st day of January, A. D. 1881, entered upon the duties of his office as receiver of public moneys for the district of lands subject to sale at Niobrara, Nebraska, and continued to perform the duties of said office until on or about the 1st day of November, A. D. 1882.

Plaintiff further alleges that while holding said office and during the dates last set forth above the said Howard S. Lovejoy received fees, commissions, and other large sums of moneys on account of the sales, homesteads, pre-emption, and timber-culture entries and disposition of the public lands within said district of lands subject to sale at Niobrara, Nebraska; that of the said public moneys so received and other public moneys received by him as receiver of public moneys at Niobrara, Neb., the said Howard S. Lovejoy has failed to account to this plaintiff in the sum of $12,365.38; that said Howard

5 S. Lovejoy, while holding said office of receiver of public moneys aforesaid, has converted and appropriated to his own use and benefit, of the moneys that came into his hands as such receiver, belonging to the United States, the sum of $12,365.38.

Plaintiff further alleges that the First Comptroller of the Treasury, upon and about the 17th day of October, A. D. 1882, made an adjustment of the accounts of said Howard S. Lovejoy as receiver of public moneys for the district of lands subject to sale at Niobrara, Nebraska, and found said balance of $12,365.38 due to this plaintiff, and reported said sum due, and notified, on said last-named date, the said Howard S. Lovejoy of said balance and demanded payment of the same to said plaintiff, but said defendant, Howard S. Lovejoy, neglected and refused to pay the same or any part thereof. A copy of said account, marked "Exhibit B," is herewith filed with this petition.

6 Said plaintiff further alleges that said Howard S. Lovejoy has not truly and faithfully executed and discharged all the duties of his said office according to law, as plaintiff with greater particularity has set forth above. Whereby a breach has been made in the conditions of said bond and the same becomes forfeited and the said bondsmen—the said defendants—become liable to the said plaintiff in damages to the amount of $12,365.38, with lawful interest. Wherefore plaintiff prays judgment against the said defendants in the sum of $12,365.38 and interest at the rate of 6 per cent. per annum from the 17th day of October, A. D. 1882, and costs of this action.

GENIE M. LAMBERTSON,
U. S. Attorney.

UNITED STATES OF AMERICA, }
District of Nebraska, } ss:

Genie M. Lambertson, being first duly sworn, upon oath deposes and says that he is the duly authorized attorney of record for the

plaintiff in the above-entitled action; that he has read the
7 foregoing petition, and the matters and facts set forth therein are true, as affiant verily believes.

GENIE M. LAMBERTSON.

Subscribed in my presence and sworn to before me this 21st day of February, A. D. 1884.

ELMER S. DUNDY, JR.,
Clerk U. S. District Court.

Precipe.

The clerk of the court will issue a summons in the above-entitled action, returnable according to law, for the defendants, Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Lewellen, David Croissart, Charles A. Oelsligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Richard W. Williamson, Samuel W. Hayes, Alfred Bigelow, Fritz M. Sackett, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Bernarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenk, J. S. McClary,
8 Charles P. Mathewson, Adelbert L. Nickerson, and Hugh G. Clark, endorsed $12,365.38, and 6 per cent. interest from October 17th, 1882.

G. M. LAMBERTSON,
U. S. Attorney.

Approved.
Jan'y 18th, 1881.

C. SCHULZ, *Secretary.*

Attached to said petition is "Exhibit A," in words and figures following, to wit:

"EXHIBIT A."

Know all men by these presents that we, Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Lewellen, David Croissart, Charles A. Oelsligle, Richard Williams, Conrad Hartman, Thomas W. Means, John Malzacker, Willard W. Wilkenson, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Benarder A. Trueblood, John H. Snider, Micajah W. King, Ogden B. Elwood, and George Graves, all of Oakdale, Antelope Co., Nebraska; Robert H. Maxwell, of Battle Creek, Madison Co., Neb.; Samuel W. Hayes and Alfred Bigelow, of Norfolk, Madison Co., Neb.; Fitz M. Sackett, of Albion, Boon Co., Neb.; Alexander Bear, Peter Schwenk,
9 John S. McClary, Chas. P. Mathewson, of Norfolk, Neb.; Adelbert L. Nickerson, of Albion, Boon Co., Neb., and Hugh G. Clark, of Omaha, Neb., are held and firmly bound unto the United States of America in the full and just sum of fifty, $50,000, thousand dollars money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these present-. Sealed with our seals and dated this — day of —, in the year one thousand eight hundred and —.

The condition of the for-going obligation is such that whereas the President of the United States hath pursuant to law appointed the said H. S. Lovejoy to be receiver of public moneys for the district of lands subject to sale at Niobrara, Nebraska, by commission dated April 28th, 1880, now, therefore, if the said H. S. Lovejoy has truly and faithfully executed and discharged, and shall
10 continue faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue.

Signed, sealed, and delivered in presence of—

S. D. THORNTON.
C. HOLLENBRAK.
THOMAS KUYZER.
THOS. KUYZER.
J. W. GETCHELL.
C. HALLENBROCK.
R. H. MAXWELL.
M. A. LECOMPT.
S. D. THORNTON.
CHAS. P. MATHEWSON.
W. H. LEEMAN.
CHARLES P. MATHEWSON.
W. E. BISHOP.
ED. L. CONNELY.
F. H. GALLRAITH.
C. F. HUNTINGTON.
C. E. LOVEJOY.
F. H. DANIELS.
GERHARD SCHMITZ.
W. W. LOWE.
11 CHARLES P. MATHEWSON.
W. W. LOWE.
S. A. BRUMBOUGH, witness.
ED. L. CONNELLY.
GEO. B. HAMILTON.
WM. H. IJAMES.
B. B. E. KENNEDY.

HOWARD S. LOVEJOY. [SEAL.]
JOHN MURPHY.
GEO. W. WINDERS.
JOSEPH LEWELLEN.
DAVID CROISSART.
CHAS. OLESLIGLE.
R. H. MAXWELL.
RICHARD WILLIAMS.
CONRAD J. HARTMAN.
THOS. W. MEANS.
JOHN MALZARKER.
RICHARD W. WILLIAMSON.
SAMUEL W. HAYES.
ALFRED BIGELOW.
FITZ M. SACKETT.
JACOB BAUSMAN.
JEPTHA HOPKINS.
JOHN H. COWAN.
BERNARDER A. TRUEBLOOD.
JOHN H. SNIDER.
MICALAH W. KING.
OGDEN R. ELWOOD.
GEORGE GRAVES.
ALEXANDER BEAR.
PETER SCHWENK.
J. S. MCCLARY.
CHAS. P. MATHEWSON.
ADELBERT L. NICKERSON.
HUGH G. CLARK.

Approval of the United States District Judge or Attorney.

I hereby certify to the sufficiency of the thirteen sureties whose names are first signed to the within bond, for the sum of $23,000.00, twenty-three thousand dollars, and approve the same to that amount this first day of July, A. D. 1880.

G. M. LAMBERTSON,
U. S. Att'y for Nebraska.

I hereby certify to the sufficiency of the sureties upon the within bond and approve the same this 30th day of December, A. D. 1880.

G. M. LAMBERTSON,
U. S. Att'y for Neb.

I, Howard S. Lovejoy, do solemnly swear that I have never
12 voluntarily born- arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution in the United States hostile or inimical thereto. And I do further swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully dis-
13 charge the duties of the office on which I am about to enter, so help me God.

HOWARD S. LOVEJOY. [L. S.]

STATE OF NEBRASKA, } ss:
Douglas County, }

Subscribed and sworn to before me this 28th day of December, 1880.

WM. H. IJAMES,
Clerk District Court, Douglas Co., Nebraska.

Upon the back of said petition appear endorsements in the words and figures following, to wit:

No. 225 H. The United States *vs.* Howard S. Lovejoy. Petition and precipe. Filed Feb. 20, 1884. Elmer D. Frank, clerk. G. M. Lambertson, U. S. att'y.

14 Thereupon, afterwards, to wit, on the 24th day of April, 1884, an answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

THE UNITED STATES *vs.* HOWARD S. LOVEJOY *et al.*

And now come all the defendants named in the petition, except Howard S. Lovejoy, and for answer say—

First. They admit that Howard S. Lovejoy was, during the time set forth in the petition, the receiver of public moneys for the district of lands subject for sale at Niobrara, Nebraska; and the said defendants further admit that at about the time stated in the peti-

tion they and each of them attached their names as sureties to a certain pretended or alleged bond for the faithful performance
15 of the duties of said office by said Lovejoy; and defendants say that they are not informed and have no means of knowing, other than from the statement of the petition, as to whether or not the bond set forth therein and of which a copy is attached thereto is the same identical bond in all respects as the one so signed by them, and therefore deny that they as sureties signed and executed the bond in words and figures and form as set forth in the petition and leave the plaintiff to its proof thereon.

The defendants further admit that said Lovejoy during the time that he so held said office received large sums of money on account of the plaintiff, and they say they have no information or knowledge as to whether or not said Lovejoy well and truly accounted to the United States of America for the monies so received by him, except from the statement contained in the petition, and therefore they deny that said Lovejoy failed, neglected, or refused to properly account for and pay over to the said plaintiff the money so re-
16 ceived by him in his official capacity or any part thereof.

The defendants, further answering, say that prior to the first day of January, 1882, the register of said land office for the district of lands subject to the entry and sale at Niobrara, Nebraska, notified the Interior Department of the Government by official letter that said Lovejoy was, by means of drunkenness and inattention to duty, wholly unfit to perform the duties of his said office, and that it was unsafe to entrust the said Lovejoy with the monies of the Government; and defendants charge that thereby and at that time the plaintiff had full knowledge and information that said Lovejoy was wholly incompetent to discharge the duties of said office, and that it was dangerous and unsafe to permit said Lovejoy to receive or handle any of the funds of the Government, and that said information was so given to said Government at the solicitation of
17 certain of these defendants, sureties upon said bond.

Defendants, further answering, say that in the spring of 1882, at various times, both prior and subsequent to the first day of April, the Hon. Edward K. Vallentine, member of Congress from the district of Nebraska, at the request of these defendants, and acting both in his official capacity and as agent of these defendants, notified the Interior Department of the Government and the Secretary thereof that said Lovejoy had become drunken, dissolute, and neglectful of his business, and that he had utterly failed to attend to the duties of his said office, and that it was unsafe and dangerous for said Lovejoy to receive and have in his possession the monies of the Government, and urged said Department, on behalf of these defendants, to at once remove or suspend said Lovejoy from the office and to refuse to entrust him with any further monies of the
18 Government or to permit him to collect or receive the same.

Defendants, further answering, say that some time during the month of June Peter Schwenk, one of these defendants, together with said Valentine, both acting on behalf of all of said defendants, went in person to the Honorable H. M. Teller, Secretary of the Inte-

rior Department of the Government, and notified him that said Lovejoy was a common druncard and did not attend to the duties and business of his said office, and that it was unsafe to entrust him with the possession or disposal of any of the money of the Government, and asked and demanded the said Secretary, in behalf of said secureties, the immediate removal or suspension from office of said Lovejoy, and asked and demanded that no further monies of the Government should be entrusted to his care, and that he should not be permitted to receive any of the funds of the Government from any source whatsoever.

19 And defendants say that it was the duty of the Government of the United States, upon being so notified at said various times, and knowing and understanding that said Lovejoy had utterly failed and was unable to attend to the duties of his said office, to have removed or suspended him from the same, and that it was especially the duty of the said Government to take such action as would prevent the said Lovejoy from further receiving any monies of the Government from any source whatever.

And defendants charge that said Government and said Interior Department thereof, in violation of the rights of these defendants, knowing of said facts, refused at all said times to remove or suspend the said Lovejoy, and continued to entrust him with the collection, care, and custody of said public monies.

Defendants, further answering, say that said Lovejoy after 20 the 1st of April, 1882, did not at any time make to the Government of the United States, as required by law and the instructions of the Interior Department, any reports of monies received and disbursed by him, either monthly, daily, or otherwise, but utterly failed to do so; which said failure was at all times subsequent to the first day of April known to the Government of the United States and to said Department.

Defendants, further answering, say that said Lovejoy did not at any time subsequent to the first day of Apr., 1882, deposit with any of the Government depositories of the United States, or any department or officer thereof, any monies received by him in his official capacity; all of which was known to said Government and said Department at all times subsequent to said first day of April.

Defendants further say that by the laws of the United States and regulations of said Department, it was the duty of the Govern- 21 ment, its Secretary of the Interior, and its officers to have removed or suspended said Lovejoy so soon as he failed to make said monthly or daily reports, and to deposit the public monies so received by him, as required by law and the regulations of said Department.

Defendants say that subsequent to the first day of April, 1882, said Department on various days and dates wrote numerous letters to said Lovejoy asking and demanding a report of the monies received by him; to which communications said Lovejoy made no reply, and said plaintiff and said Department of the Interior at all times subsequent to the said first day of April knew and had full information that said Lovejoy had received monies of the United

States and had not accounted for the same and had applied them to his own use and was a defaulter to the Government and was wholly negligent of the duties of his said office and misappropriating the funds received by him by virtue thereof, and it was the duty
22 of the said Government, upon receipt of such information and having such knowledge, to have at once removed or suspended him from office.

Defendants, further answering, say that all of the monies, of whatever account or kind, received by said Lovejoy by virtue of said office, for which he may have failed to account to the Government of the United States, and all monies received by him and so misappropriated were received and so misappropriated and embez-*el*led long subsequent to the said first day of April, and, as defendants are informed and verily believe, nearly all of said accounts were received by him and so appropriated to his own use as late as the month of October, 1882.

Defendants, further answering, say that during all the time that said Government knew that said Lovejoy was misappropriating said funds and not attending to the duties of the said office, and
23 that they were endeavoring by themselves and by said Valentine to secure the removal or suspension from office of said Lovejoy in order to relieve themselves from liability upon said bond.

Defendants, further answering, say that said Department of the Interior finally required these defendants to make a written demand for the removal of said Lovejoy, setting forth the facts aforesaid, which was finally made by them on or about the 12th day of September, 1882.

Defendants, further answering, say that some time in January, 1883, after the removal of said Lovejoy from his said office, said Lovejoy had in his possession in money of the United States all of the sums belonging to the said Government which he had received by virtue of his said office and not accounted for to the plaintiff; that while he so had said money in his possession a complaint was made in the district court of the United States for the district of Ne-
24 braska against said Lovejoy, charging him with the crime of misappropriating the monies so received by him as such officer aforesaid, and that the warrant for his arrest was placed in the hands of the marshal*l* of the United States, and that the officers of said Government were repeatedly urged by these defendants to at once proceed in the execution of said warrant and secure the person of the said Lovejoy and the said funds of the Government then in his possession; that said officers were notified and advised by these defendants of the whereabouts of said Lovejoy; that the said Government neglected, failed, and refused to cause the apprehension of said Lovejoy for a long period of time, and took no steps to secure his apprehension or recovery of said money so being in his possession as aforesaid; and that these sureties, finding that said Government would not proceed in the matter against said Lovejoy personally, Peter Schwenk, one of these defendants, went to said
25 Lovejoy, whom he found at the place where the officer of the

Government had been informed that said Lovejoy could be apprehended and said money taken, and secured from said Lovejoy a large amount of monies of the Government so retained by him and deposited the same to the credit of the United States, and said sum has been credited to the account of said Lovejoy by the Government.

And defendants say that if said Government had exercised due dil*l*igence in the premises and had acted upon the advice and request of these defendants it could and would have secured the apprehension of said Lovejoy and the recovery of all of said monies so appropriated by him, and defendants say that whatever loss there has been to the Government of the United States has been caused solely by the failure of said Government and its officers to perform its and their duty in the premises; that they are not liable
26 upon said bond for any of the money sued for in the petition, and that they have at all times taken such steps and measures as was in their power to secure the Government from loss or injury by the acts of said Lovejoy, and said loss, if any, was caused by the wrongful and unlawful detention in office by the plaintiff of said Lovejoy after full notification, to wit, by those defendants as aforesaid.

Defendants further say that said bond is not a valid bond as against these defendants; that they are not liable thereon, and they deny each and every allegation in the petition contained not hereinbefore especially qualified, explained, or admit-ed, and they ask to be dismissed hence with costs.

THURSTON & HALL,
Defendants' Attorney.

UNITED STATES, }
District of Neb., Douglas County, } *ss:*

Hugh G. Clark, being duly sworn, says he is one of the defendants in the foregoing-entitled cause of action; that he has read
27 the answer above and knows the facts set forth therein and believes the same to be true.

Signed in my presence and sworn to before me this twenty-sixth day of April, 1884.

HUGH G. CLARK.

Signed in my presence & sworn to before me this 26th day of April, 1884.

[SEAL.] W. F. GURLEY,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 225 H. In U. S. circuit court. The United States *vs.* Howard S. Lovejoy. Answer. Filed Apr. 24, 1884. Elmer D. Frank, clerk. Thurston & Hall, def't's attorneys.

28 Thereupon, afterwards, to wit, on the 6th day of May, 1884, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the District of Nebraska, *ss:*

THE UNITED STATES, Plaintiff,

vs.

HOWARD S. LOVEJOY *et al.*, Defendants.

Comes now the said plaintiff and for its reply to the answer of defendants says that it has no knowledge as to the truth of the allegations and matters set out in defendants' answer, and therefore denies each and every allegation therein contained, except what is admitted in the answer, and renews the prayer of the petition for judgment and costs.

GENIO M. LAMBERTSON,
U. S. Attorney.

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

29 Genio M. Lambertson, being first duly sworn, upon oath deposes and says that he is the attorney of record for plaintiff and authorized to make this affidavit; that he has read the foregoing reply, and the matters and facts set forth therein are true, as affiant believes.

GENIO M. LAMBERTSON.

Subscribed in my presence & sworn to before me this 6th day of May, A. D. 1884.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit:

No. 225 H. The United States *vs.* Howard S. Lovejoy *et al.* Reply. Filed May 6, 1884. Elmer D. Frank, clerk. G. M. Lambertson, att'y for plaintiff.

30 Thereupon, afterwards, to wit, on the 14th day of November, 1884, a stipulation for trial was filed in said case, which said stipulation for trial is in words and figures following, to wit:

Stipulations for Trial.

In the Circuit Court of the United States for the District of Nebraska.

THE UNITED STATES, Plaintiff,

vs.

HOWARD S. LOVEJOY *et al.*, Defendants.

It is hereby stipulated that the above-entitled cause shall be tried on the 25th of November, or as soon thereafter as the court will enter on the trial of the same.

G. M. LAMBERTSON,
U. S. Att'y.
JOHN M. THURSTON,
Def'ts' Att'y.

Upon the back of said stipulation for trial appear endorsements in words and figures following, to wit: No. 225 H. The United States *vs.* Howard S. Lovejoy *et al.* Stipulations for trial. Filed November 14, 1884. Elmer D. Frank, clerk.

31 Thereupon, afterwards, at the November term of said court, on the 16th day of December, 1884, the following proceedings were had and done, as appears of record on folio 663, Journal I of said court, to wit:

UNITED STATES
vs.
HOWARD S. LOVEJOY *et al.* } 225 H.

This cause coming on for trial, and it appearing to the court that the regular panel of petit jurors is incomplete, it is ordered by the court that the U. S. marshal summon talesmen to fill up said panel.

Trial.

UNITED STATES
vs.
HOWARD S. LOVEJOY *et al.* } 225 H.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit:

1, N. N. Crary; 2, Meyer Hellman; 3, E. F. Shelby; 4, L. A. Ryan; 5, J. H. McShane; 6, J. H. Curry; 7, C. L. Erickson; 8, Richard
32 Kimball; 9, J. S. McCormick; 10, Alexander Atkins; 11, Phil. McShane; 12, W. C. Cloud—who were duly empaneled and sworn according to law, and, the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at 10 o'clock.

Thereupon, afterwards, to wit, on the 17th day of December, 1884, a motion to compel defendants to elect upon which defense they will stand was filed in said case, which said motion is in words and figures following, to wit:

Motion for Def'ts to Elect upon Which Defense They will Stand.

In the Circuit Court of the United States for the District of Nebraska.

THE UNITED STATES, P'tiff,
vs.
HOWARD S. LOVEJOY *et al.*, Defendant-.

Comes now the plaintiff and moves the court to compel the defendants to elect upon which defense they will stand and offer evidence, the defenses stated in the answer not being consistent.

G. M. LAMBERTSON,
U. S. Attorney, Neb.

33 Upon the back of said motion appear endorsements in words and figures following, to wit: No. 225 H. The United States *vs.* Howard S. Lovejoy *et al.* Motion to compel defendants to elect upon which defense they will stand. Filed Dec. 17, 1884. Elmer D. Frank, clerk. G. M. Lambertson, U. S. attorney.

Thereupon, afterwards, at the November term of said court, on the 22nd day of December, 1884, the following proceedings were had and done, as appears of record on folio 674, Journal I of said court, to wit:

34 *Cause Submitted to Jury.*

UNITED STATES *vs.* HOWARD S. LOVEJOY *et al.*

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein; and thereupon, after hearing the remaining evidences, the argument of counsel, and charge of this court, said jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now comes said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

Special Findings and Verdict of the Jury.

In the Circuit Court of the United States for the District of Nebraska.

THE UNITED STATES, Plaintiff,
vs.
HOWARD S. LOVEJOY *et al.*, Defendants.

35 We, the jury, being duly empaneled and sworn to well and truly try the issues in the above-entitled cause and a true verdict render according to the law and the facts, do specially find as follows:

First. We find that the bond in question was signed and executed by the following-named defendants: Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Leweller, David Cossiant, Chas. A. Oelslegle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malzacker, Willard W. Wilkenson, Samuel W. Hayes, Alfred Bigelow, Fitz M. Sackett, Jacob Bausman, Jeptha Hopkins, John H. Cowin, Bernarder Trueblood, John H. Snider, Micajah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenk, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, Hugh G. Clark.

Second. We find that the genuine signatures of the following-named defendants are attached to the bond introduced in evidence, viz: Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Leweller, David Cossiart, Chas. A. Oelslegle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malzacker, Willard W. Wilkinson, Samuel W. Hays, Alfred Bigelow, Fitz M. Sackett, Jacob Bausman, Jeptha Hopkins, John H. Cowin, Bernarder A. Trueblood, John H. Snider, Micajah W. King,
Ogden R. Elwood, George Graves, Alexander Bear, Peter
36 Schwenk, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, Hugh G. Clark.

Third. We find that the genuine signature of the defendant, Thomas W. Means, is on the bond introduced in evidence.

Fourth. We find that the erasures in the body of the bond consists of erasures made by running the pen through the words, names, and places following, to wit: Jacob Bausman, Jeptha Hopkins, John A. Cowin, Bernarder A. Trueblood, John H. Snider, Micajah W. King, Ogden R. Elwood, George Graves, of Oakdale, Nev.

Fifth. We find that the time when the alterations were made in the bond and the persons who made them have not been proven and are unknown.

Sixth. We find that the name of C. E. Lovejoy appearing upon the bond herein as a witness is not the genuine signature of C. E. Lovejoy, but is a forgery.

Seventh. We find that the names of persons and places erased in the body of the bond consist only of the names and persons that had been repeated and twice written in the body of the bond.

Eighth. We find that the knowledge of the misconduct of
37 the defendant, Howard S. Lovejoy, was first brought home to the President on or after the 30th day of September, A. D. 1882, and that the President removed said Lovejoy from his office of receiver of public moneys on the 9th day of October, A. D. 1882; and we further find that the sureties upon the bond in January, 1882, notified the Secretary of the Interior, at his office in Washington, that H. S. Lovejoy, the principal in the bond, who was at that time receiver of the land office at Niobrara, Nebraska, was neglecting his office and the duties thereof; that he was carrying around upon his person large sums of monies of the Government at places remote from his land office, and was not depositing or transmitting the same as required by law; and they urged said Secretary to cause removal

or suspension of said Lovejoy, or to take some steps or action by which said sureties would be relieved from further liability.

Ninth. We find that the plaintiff on May 27th, June 28th, August 10th, and at other times demanded that Lovejoy send in his weekly, monthly, and quarterly accounts and reports of moneys received and unaccounted for.

Tenth. We find that if on the foregoing facts and findings
38 the plaintiff is entitled to recover in this action it is entitled to recover the sum of twelve thousand nine hundred thirty-seven & $\frac{34}{100}$ dollars; and we do therefore find for the plaintiff and assesses its damages at the sum of twelve thousand nine hundred and thirty-seven & $\frac{34}{100}$ dollars.

R. KIMBALL, *Foreman.*

Thereupon, afterwards, to wit, on the 23rd day of December, 1884, a motion for judgment on verdict was filed in said case, which said motion for judgment on verdict is in words and figures following, to wit:

Motion for Judgment on Verdict of Jury.

United States Circuit Court, District of Nebraska.

THE UNITED STATES, Plaintiff,

vs.

HOWARD S. LOVEJOY *et al.*, Defendants.

Now comes the plaintiff, The United States, by its attorney, G. M. Lambertson, and moves the court for judgment in the above-entitled action on the verdict of the jury therein.

G. M. LAMBERTSON,
Att'y for Plaintiff.

39 Upon the back of said motion for judgment on verdict appear endorsements in words and figures following, to wit: No. 225 H. U. S. circuit court, district of Nebraska. The United States, pl'iff *vs.* Howard S. Lovejoy *et al.* Motion for judgment on verdict. Filed Dec. 23, 1884. Elmer D. Frank, clerk. G. M. Lambertson, U. S. attorney.

Thereupon, afterwards, at the January term of said court, on the 6th day of January, 1885, the following proceedings were had and done, as appears of record on folio 724, Journal I of said court, to wit:

Judgment on Verdict.

UNITED STATES
vs.
HOWARD S. LOVEJOY *et al.* } 225 H.

The jury in this action having, at the November term, A. D. 1884, of this court, rendered a special verdict herein, and no motion for a new trial having been made, and thereupon this cause coming on

to be heard on the motion of plaintiff for judgment on said special verdict, and after hearing the argument of counsel and being fully advised in the premises, it is now, on this day, considered,
40 ordered, and adjudged by the court that the said plaintiff, The United States, have and recover of and from the said defendants, Howard S. Lovejoy, John Murphy, George W. Winders, Joseph Leweller, David Croissart, Charles H. Oesligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Samuel W. Hayes, Alfred Bigelow, Fritz M. Sackett, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Benarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenk, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, and Hugh G. Clark, the said sum of twelve thousand nine hundred thirty-seven and $\frac{34}{100}$ ($12,937.34) dollars, together with $—, costs herein expended, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 7th day of March, 1885, a bill of exception was filed in said case, which said bill of exception is in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, District of Nebraska.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

HOWARD S. LOVEJOY *et al.*, Defendants.

41 Be it remembered that this cause coming on for trial at the November, 1884, term of the court, the clerk of said court called into the box, as jurors, seven jurors who were upon the regular panel of jurors for said term, and there being at said time another jury composed of jurors belonging upon the regular panel of said term then engaged in deliberating upon their verdict in another case theretofore tried, when said seven jurors had been so called into the box by reason of the absence of the jurors then deliberating in the other case, and by reason of the fact that some of the regular panel had theretofore been excused by the court, there were no other jurors, except said seven, belonging to the regular panel that could then be called to try the above-entitled cause, and thereupon the court ordered and directed the marshal to summons, from the qualified electors of the State, additional persons to serve as jurors upon said cause without the same having been drawn by the clerk of the court and the jury commissioner provided by law, to which the defendants then and there duly excepted, and the marshal, under the direction of the court, having called in said additional persons
42 to serve as jurors upon said cause, and both parties having duly examined and exhausted their challenges for cause and their peremptory challenges in said cause, there were then left in the box to try this cause three jurors belonging to the regular panel and

nine persons who had been called as aforesaid from the qualified electors of the State to act as jurors in said cause. Of the twelve men then in the box to act as jurors ten of the same were residents of the city of Omaha, the place where the trial of said cause was being had, and thereupon the defendants challenged for cause each of said persons so called for the reason the same had not been drawn as jurors in said court as provided by law; which challenge the court overruled and the defendants duly excepted thereto, and the defendant- thereupon objected to proceeding to the trial before a jury so constituted, which objection the court overruled and ordered said jurors to be sworn to try said cause, to which ruling and order the defendants then and there duly excepted; and thereupon witnesses were introduced and examined on behalf of the plaintiff and
43 of the defendant-, and the evidence having been closed, and there being testimony tending to prove that the signature of Thomas W. Means, as a surety upon the bond sued upon in this case, was not his true and genuine signature, and was not made by him, and was a forgery, which said signature appears as the eighth signature in numerical order upon said bond and appears to have been regularly written in its order the same as the others thereto; and there being evidence tending to prove that after the first thirteen signatures of sureties upon said bond had been made the said bond had been presented to the United States district attorney for the district of Nebraska for approval as to the said first thirteen signatures thereon, including that of Thomas W. Means, and had been approved by him, and that thereafter said bond had been presented for signature to various other of the defendants herein, sureties upon said bond, and that they signed the said bond after the signature of Thomas W. Means was affixed thereto, supposing and believing that the same was true and genuine:

44 The court, upon its own motion, charged the jury, among other things, as follows: "As to the signature of Thomas W. Means, I think you may have some difficulty in finding that it was a forgery. Of course it is not my place to express an opinion or say whether or not I think it is genuine. All I say is that you must examine the matter carefully and fully and weigh all the testimony that bears on the subject, and if you can say that his signature is a forgery it is for you to do so.

"Suppose you find that his signature is a forgery, what effect will it have on the bond? It will have the effect, in my judgment, to release Means only, but in no manner will it effect the liability of the other parties.

"It is conceded that some of the parties who signed this bond signed it with the understanding that Means' signature was genuine; that may be so or not, but even if it be so, even if the testimony satisfies you that it is so, what of it? Whose business was it to see that the signatures to the bond were genuine, if they signed
45 it with the understanding that others had signed it? It was the business and duty of the parties themselves, and not the duty of the officers of the Government at Washington; it was the business of the parties themselves, if they signed it believing that

Means' signature was genuine, to hunt him up and ascertain, if they could, whether or not the signature was genuine—that is, if they relied upon that fact. They ought to have taken the necessary steps to ascertain for themselves whether or not the signature was genuine; it was not the place or the duty of the other side to do so. In this as in other cases, before the bond was presented to the district attorney for his certificate the parties had to go before an officer—notary public or other officer that had authority to administer oaths—and swear that they were worth a certain amount over and above the amount that would be exempt from execution and their liabilities. The same was done in this case that is done in every other one. Observe the peculiarity of the oath that the sureties have taken; they not only swear that they are worth a certain
46 amount, but they swear that they are sureties on the bond. Take that of Thomas W. Means, which is the one in controversy, a portion of which is as follows:

"'STATE OF NEBRASKA, } ss:
"'*Antelope County*, }

"'I, Thomas W. Means, one of the sureties on the official bond of Howard S. Lovejoy, receiver of the land office at Niobrara, Nebraska, depose and say that he is worth property in the sum of five thousand dollars after the payment of all judgments, debts, and liabilities.'

"Then he goes on and shows why he is worth five thousand dollars. Take that in connection with the signature on the bond and the other writing that is admitted and known to be genuine; compare the writing in the three different places, and then bring your own judgment and good sense to bear on the subject. The fact that the individual qualified before a notary public must also be considered, as was done in this case. Then say, if you can, considering all the testimony that bears on the subject, whether or not Thomas W. Means signed that bond. It seems to me, after you take these signatures and compare them fully and examine all the
47 testimony that seems to have any bearing on that question, that you cannot have much difficulty about coming to a correct conclusion." To which said charge and instruction the defendants then and there duly excepted.

And, there being evidence tending to prove that there had been an addition made to said bond by way of attaching and inserting into the body of said bond the names of certain sureties who had executed the same, and that said additional names were so inserted and attached and the signatures of the persons therein named were made as sureties to said bond after a large number of the signatures of the sureties had been made thereto, and without their knowledge or consent, and that there had been certain erasures in the body of said bond, said erasures being of names of persons twice therein appearing or names of persons who never signed the bond, the court, upon its own motion, charged the jury as follows, to wit: "So far as that is concerned, it seems to me that there is no great se-

verity on behalf of the Government, neither is there any
48 disposition on the part of the officers to unduly harass or oppress any person who is said to be indebted to the Government, on an official bond or otherwise, so far as I know. There is another question connected with the defense about which there may be some doubt, and it will be your duty, if you can, to solve that doubt and to do that by applying all of the testimony that bears upon that particular question. It is very strenuously claimed by the defendants that the bond in question has been altered and changed since it was executed and delivered, and therefore is not their bond. From what appears on the bond I should regard it as my duty to say to the jury in ordinary cases that there is no change whatever made in the bond—no apparent change in the bond, either before or after the signing of it—that would in any way effect its validity, for the reason that the alleged change was not made in a material part of the bond. So far as appears from a close inspection of the changes made in it it will show pretty clearly at least a portion of the changes shown by these erasures was in erasing
49 the names of the parties and the names of places that appeared in another place in the body of the bond; that could not effect the validity of the bond; that is merely surplusage. By striking that out, erasing it, or getting rid of it in any way, either before the bond was signed or afterwards, does not in any manner effect the validity of the bond, because it does not in any way change the liability of the parties who have signed it. I think that it can be rightly claimed that it does not in any way change the obligations of either one of the parties; it was striking out what appeared twice in the bond; to get rid of it in any way does not effect the obligation of either of the parties that signed the bond, so about that I think there is no sort of difficulty.

"Then again there seems to be a slip of paper attached with the names of several sureties written thereon; so far as that is concerned it stands precisely in the same attitude that the erasure does; it is a piece of paper attached to the bond with the names of sureties found thereon. As I take it, it would be wholly immaterial whether
50 these names were found in the body of the bond or not. You may tear that off and detach it from the bond, still it would not effect the liability of the parties who have signed it. It in no sense effects the obligation of the parties; it does not change the contract or effect it in the matter of substance at all; if it was torn off and got rid of it would be the same as if it was attached, and its being attached there does not change or effect the obligation of the parties themselves."

To which said instruction and charge the defendants then and there duly expected.

And the jury having retired to consider of their verdict upon the special questions submitted to them by the court and having returned into court their verdict as appears from the records in this case, the defendants moved the court upon the special findings of facts as returned by the said jury to render a judgment in favor of said defendants, dismissing them hence, without day, which said

motion the court then and there overruled and the defendants duly excepted thereto.

51 And the defendants here present this their bill of exceptions and pray that the same may be allowed and signed by said court and made a part of the record herein. Presented to the undersigned for allowance and signature this 7th day of March, 1885.

ELMER S. DUNDY, *Judge.*

Received the above bill of exceptions from the defendants' counsel, February 26th, 1885, and the same is returned him March 5th, 1885, without proposing any amendments.

G. M. LAMBERTSON,
U. S. Attorney.

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 225 H. U. S. circuit court, district of Nebraska. United States *vs.* Howard S. Lovejoy *et al.* Bill of exceptions. Filed March 7th, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 7th day of March, 1885, a bond was filed in said case, which said bond is in words and figures following, to wit:

52 Know all men by these presents that we, John Murphy, George W. Winters, Joseph Lewellen, David Croisart, Charles H. Oesligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Richard W. Williamson, Samuel W. Hays, Alfred Bigelow, Fritz M. Sacket, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Bernarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bean, Peter Schwenk, J. S. McClary, Charles P. Mathewson, Adebert L. Nickerson, and Hugh G. Clark, *A. P. Pilger, Charles Ebble, P. H. Egbert, and J. B. French, *U. A. Rumbolt, August Sattler, are held and firmly bound unto the United States of America in the full and just sum of twenty-eight thousand dollars, to be paid the United States of America or its certain attorney or assigns, to which payment, well and truly to be made, we do bond ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this third day of March, 1885,

53 in the year of our Lord one thousand eight hundred and eighty-five. Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court wherein the United States of America was plaintiff and John Murphy, George W. Winters, Joseph Luellen, David Crossiart, Charles W. Oesligle, R. H. Maxwell, Richard Williams, Conrad J. Hartman, Thomas W. Means, John Malyacker, Richard W. Williamson, Samuel W. Hayes, Alfred Bigelow, Fritz M. Sacket, Jacob Bausman, Jeptha Hopkins, John H. Cowan, Bernarder A. Trueblood, John H. Snider, Micalah W. King, Ogden R. Elwood, George Graves, Alexander Bear, Peter Schwenck, J. S. McClary, Charles P. Mathewson, Adelbert L. Nickerson, and Hugh G. Clark, were defendants, a judgment was rendered against said defendants for the sum of twelve

thousand nine hundred and thirty-seven & $\frac{34}{100}$ dollars ($12,937.34) and costs, and the said defendants having obtained a writ of error and having filed a copy in the clerk's office of said court to
54 reverse said judgment in the aforesaid suit and a citation directed to the United States citing and admonishing it to be and appear at a supreme court to be holden at Washington on the ——

Now the condition of the above obligation is such that if the said defendants shall prosecute their *their* writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; otherwise of force.

N. W. RAINBOLT, *Surety.*
A. P. PIGER, "
T. H. EGBERT, "
AUGUSTUS SATTLER, "
CHARLES EBLE.

1. CHARLES P. MATHEWSON.
GEORGE WINDON.
ALEX. BEAR.
CHAS. A. OELSLIGLE.
R. H. MAXWELL.
RICHARD WILLIAMS.
CONRAD J. HARTMAN.
JOHN MALZACKER.
ALFRED BIGELOW.
S. W. HAYES, Principal.
AUGUSTUS SATTLER,
Surety to S. W. Hayes in the sum of one thousand dollars.
JACOB BAUSMAN.
55 J. HOPKINS.
JOHN COWIN.
J. W. SNIDER.
MICAJAH W. KING.
Q. R. ELWOOD.
GEO. GRAVES, Principal.
JOHN M. LEEPER,
Surety to Geo. Graves in the amount of one tho's'd dollars and no more.
P. SCHWENK.
JOHN S. McCLARY, Principal.
W. G. WILLIAMS,
Surety in the sum of one thousand dollars.
HUGH G. CLARK.
JENNIS B. FRENCH.

THE STATE OF NEBRASKA, } ss:
Madison County, }

We, N. A. Raibolt, A. T. Pieger, T. H. Egbert, Augustus Sattler, and Charles Ebb, each being duly sworn, on oath say that *they* are sureties on the bond hereto attached, and that each of us have signed our names

to said bond as sureties; that I, the said N. A. Rambolt, am worth over and above my debts and have property liable to execution in said State of the value of four thousand dollars, and I, the
56 said A. P. Pieger, am worth above all my debts and have property liable to execution in said State of the value of seven thousand dollars; that I, August Sattler, am worth and have property liable to execution and above debts of the value of five thousand dollars, and I, T. H. Egbert, am worth above all my debts and have property liable to execution in said State of the value of five thousand dollars, and I, Charles Ebb, am worth and have property liable to execution and above all debts — the sum of four thousand dollars.

A. P. PIEGER.
T. H. EGBERT.
N. A. RAINBOLT.
CHARLES EBB.
AUGUSTUS SATTLER.

Sworn to before me and subscribed in my presence by the within-named N. A. Rainbolt, A. P. Pieger, T. H. Egbert, Augustus Sattler, and Charles Ebb this 6th day of March, A. D. 1885.

[SEAL.] A. J. DUNLAND,
Notary Public.

STATE OF NEBRASKA, } ss.:
Douglas County, }

J. B. French, being duly sworn, on his oath says that he
57 has property of the value of five thousand dollars over and above all debts and liabilities and exemptions of any kind allowed by law.

JENNIS B. FRENCH.

Signed & sworn to before me this 7th day of March, 1885.

[SEAL.] R. S. HALL,
Notary Public.

7 MARCH, 1885.

The above bond is approved.

ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 225 H. U. S. circuit court, district of Nebraska. United States *vs.* Howard S. Lovejoy *et al.* Bond. Filed March 7, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 6th day of June, 1885, a writ of error was allowed and a citation issued in said case, the following of which are the original copies:

58 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States of America, as plaintiff, and Howard S. Lovejoy *et al.*, are defendants, a manifest error hath happened, to the great damage of the said defendants in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States *shall* be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 6th day of June, 1885.

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 225 H. United States circuit court, district of Nebraska. The United States *vs.* Howard S. Lovejoy *et al.* Writ of error. Filed June 6, 1885. E. D. Frank, clerk.

59 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Howard S. Lovejoy *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 6th day of June, 1885.

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 6th day of June, 1885, I received this citation and on the 8th day of June, 1885, I served the same upon the within-named The United States of America, by G. M. Lambertson, U. S. attorney, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By R. E. ALLEN,
Deputy United States Marshal.

Marshal's costs, $—.

[Endorsed:] No. 225 H. United States circuit court, district of Nebraska. Howard S. Lovejoy *et al.*, plaintiffs in error, *vs.* The United States, def't in error. Citation. Filed June 6th, 1885. Elmer D. Frank, clerk.

60 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios from one to 58 contain true and faithful transcripts from the records and files of said court in the case of The United States *vs.* Howard S. Lovejoy *et al.*, and that a copy of the writ of error and citation has been lodged and remains in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 9th day of July, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

61 In the Supreme Court of the United States,

HOWARD S. LOVEJOY *et al.*, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA, Defendant in Error.

The said plaintiffs in error come into court, by their counsel, and pray the reversal of the judgment of the circuit court of the United States of the district of Nebraska in the above-entitled cause, and aver that there is error in the record and proceedings in said cause, and thereupon assign the following as such errors:

I.

The court erred in directing the marshal of the United States to summon talesmen to fill up the jury which was being empanelled to try said cause, and erred in permitting the talesmen so called to be sworn and retained as jurors to try said cause against the objection of the plaintiffs in error.

II.

The court erred in instructing the jury upon its own motion those matters and things concerning the alleged forgery of the name of Thomas W. Means as a surety to said bond and of the legal effect of such alleged forged signature, which instruction appears in full in the bill of exceptions hereto.

III.

The court erred in instructing the jury upon its own motion as to the alleged erasures, interlineations, and additions made to the bond in suit after the signatures of most of the sureties had been
62 placed thereon, which said instructions appear in full as excepted to in the bill of exceptions.

IV.

That the court erred in so instructing the jury as to give the jury clearly to understand and know what the opinion of the court was upon the matters of fact in issue before the jury, thereby tending to influence their action in favor of the defendant in error.

V.

That the court erred in sustaining the motion of the defendant in error for the judgment upon the special findings of the jury in the case.

VI.

The court erred in rendering judgment for the defendant in error as against the plaintiffs in error herein.

JOHN M. THURSTON,
Att'y for Pl'ffs in Error.

[Endorsed:] Supreme Court. Howard S. Lovejoy *et al.*, pl'ffs in error, *vs.* The U. S. of America, def't in error. Assignment of errors. J. M. Thurston, att'y for pl'ff in error.

Endorsed on cover: Nebraska C. C. U. S. No. 293. Howard S. Lovejoy *et al.*, plaintiff in error, *vs.* The United States. Filed September 18, 1885.

Office Supreme Court U. S.
FILED.
OCT 17 1888
JAMES H. McKENNEY.
Clerk.

Supreme Court, United States.

HOWARD S. LOVEJOY, *et al.*,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN M. THURSTON,
Attorney for Plaintiffs in Error.

Klopp, Bartlett & Co., Printers, Omaha.

Supreme Court, United States.

HOWARD S. LOVEJOY, *et al.*,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

FIRST:—

I have in two cases before this court urged that there was error committed by the Circuit Court in calling into the box to try the case those persons who had not been selected and drawn in the manner provided by law for the selection of juries to try cases in that court. In the other two cases presented, the court has found other errors sufficient to reverse the judgment below, without passing upon the question as to the formation of the jury.

In the case at bar it will appear that, by reason of the fact of the other jurors being out deliberating upon a case, there were not upon the regular panel enough in attendance to secure a regular jury to try

the case at bar, and the result was that in summoning from the bystanders a jury was finally secured consisting of ten persons not upon the regular panel, all living in the one city of Omaha, where the trial was had.

This is exactly the same result as was found in the other two cases formerly presented arising within the same jurisdiction where the trials were had at the same place.

I submit that if there is any virtue at all in the statute of the United States there was error committed in this case. If it can be admitted for a single moment that the judge may call in outsiders without having had their names drawn from the box, then the whole purpose and intent of the present jury law can be set at defiance whenever or wherever it is desired by the judge to do so. It will only be necessary to excuse from attendance most of the regular panel and then continue the trial of cases day after day through the whole term before such persons as the United States Marshal may see fit to call upon to serve. This opens the door to the very wrong which the statute was intended to remedy.

SECOND:—

The other errors assigned may be disposed of; so far as this argument is concerned, by saying that it appears perfectly evident, from the instructions of the court to the jury, that the jury was given to understand what the opinion of the court was as to the alleged forgeries, erasures and alterations upon the face of the bond; and the jury were told by the court that he thinks they may have some difficulty in finding

that a certain signature on the bond is a forgery; and he stated that "If you can say that this signature is a forgery it is for you to do so;" and they were further directed by the judge as follows: "It seems to me if you take these signatures and compare them fully, and examine all the testimony that seems to have any bearing on that question, that you cannot have much difficulty about coming to a correct conclusion." And by an examination of that portion of the charge set forth in the Bill of Exceptions, it will be seen that the Court took away from the jury the right to examine for itself the alleged alterations and erasures on the face of the bond and passed upon that question as a matter of law; virtually directing them to find against the defendant upon that point.

For the reasons above set forth I urge the Court that there is error in the record and the case should be reversed.

JNO. M. THURSTON,

Attorney for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
OCT 24 1888
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

HOWARD S. LOVEJOY ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES.
No. 34.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

HOWARD S. LOVEJOY ET AL., plaintiffs in error,
vs.
THE UNITED STATES.
No. 34.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

This is an action against Howard S. Lovejoy and twenty-eight sureties on his official bond as receiver of public moneys for the land district of Niobrara, Nebraska.

The complaint alleges that between the 1st of January, 1881, and the 1st of November, 1882, Lovejoy, as such officer, received, failed to ac-

count for, and appropriated to his own use various sums of money, amounting to the sum of $12,365.38, and that the said sum is the amount certified by the First Comptroller as due by the said Lovejoy. This sum the complainant demands, with interest at 6 per cent. from the 17th of October, 1882 (R., pp 1, 2).

The penalty of the bond sued on is $50,000 (R., p. 3).

So far as the record shows, Lovejoy made no defense, but his sureties filed a joint answer to the Government's petition or complaint on 24th April, 1884 (Rec., pp. 5–9.)

The defenses set up in that answer are as follows:

(1) That defendants, not being able to say whether the copy of the bond exhibited is a true copy of the bond executed by them, they deny that they as sureties signed and executed the bond set out in the petition, and require proof thereon.

(2) Having no knowledge, apart from the petition, as to whether Lovejoy properly accounted

for the moneys that came to his hands, they deny that he failed to account for and pay over the same.

(3) That prior to the 1st January, 1882, the register of the land office at Niobrara, at the instance of some of the defendants, notified the Interior Department by official letter that Lovejoy was, from drunkenness and inattention to duty, wholly unfit to perform the duties of his office, and that it was dangerous and unsafe to permit him to receive or handle the public money.

(4) That in the spring of 1882, both prior and subsequent to the 1st of April, the Hon. Edward K. Valentine, member of Congress from the district of Nebraska, at the request of defendants and in his official character, notified the Interior Department and the Secretary thereof that Lovejoy, from drunkenness and dissoluteness and negligence, wholly neglected the duties of his office, and that it was unsafe for him to have possession of the public money.

(5) That "some time during the month of June"

Peter Schwenk, one of the defendants, and said Valentine went in person to Hon. H. M. Teller, Secretary of the Interior, and notified him that Lovejoy was a common drunkard and neglected his duties, and that it was unsafe to allow him to receive the public money, and asking his immediate removal or suspension, and demanded that he should not be permitted to receive any more public money.

(6) That it thereupon became the duty of the Government to remove or suspend Lovejoy, or take such action as would prevent him from receiving any more public money.

(7) That the refusal to take such action was a violation of the defendants' rights.

(8) That after the 1st April, 1882, Lovejoy made no reports of the moneys received and disbursed by him, and that his failure to do so was known to the Government.

(9) That after 1st April, 1882, Lovejoy made no deposit with any Government depositary or other functionary of moneys received by him as receiver, of all which the Government had notice.

(10) That it was the duty of the Government to remove or suspend Lovejoy.

(11) That Lovejoy, after 1st of April, 1882, took no notice of numerous official letters calling on him to send in a report of the moneys received by him, and that the Government knew he was a defaulter and should have removed him.

(12) That the money misappropriated by Lovejoy was received by him after 1st April, 1882, and they believe nearly all of it in October, 1882.

(13) That the Department of the Interior required defendants to make a written demand for Lovejoy's removal, setting forth the facts, and that such demand was made on or about the 12th September, 1882.

(14) That in January, 1883, after Lovejoy's removal, and after a "*complaint*" had been made against him for misappropriating public money, Lovejoy had in his possession all the money he had failed to account for; that the warrant for his arrest was in the marshal's hands, and that, although the officers of the Government were notified of Lovejoy's whereabouts, they failed

and neglected to secure him and the said money, and that finally the defendant, Peter Schwenk, went to Lovejoy and got from him a large amount of said money and deposited the same to the credit of the United States as a payment on Lovejoy's account.

(15) That but for the failure and neglect of the Government officials the whole of said misappropriated money would have been secured; that the defendants have done all they could to protect the Government from loss, and that they are not liable on their bond for money claimed.

(16) Defendants deny that the bond in suit is their bond; and they deny each and every allegation of the petition not "specially qualified, explained, or admitted" in their answer.

The answer is sworn to by *one* of the defendants, Hugh G. Clark.

The United States filed a replication putting the answer in issue (R., p. 10).

The case was tried at the November term, 1884, and on the 22d December, 1884, the jury returned a special verdict (R., pp. 12–14).

THE SPECIAL VERDICT.

The jury find that the signatures to the bond in suit are the genuine signatures of all the defendants, and they specially find that the signature of the defendant, Thomas W. Means, is genuine. They find that it does not appear when or by whom the alterations in the bond were made, and that the names of persons and places erased in the body of the bond "*consist only of the names and persons that had been repeated and twice written in the body of the bond.*"

They find that the name of C. E. Lovejoy, appearing as one of the witnesses, is a forgery.

They find that the knowledge of Lovejoy's conduct "was first brought home" to the President on or after 30th September, 1882, and that the President removed Lovejoy on the 9th October, 1882; and that the sureties in January, 1882, notified the Secretary of the Interior that Lovejoy was neglecting his duties, and was carrying on his person large sums of Government money at places remote from his office, and was not depositing or transmitting the same as

required by law; and that they urged the Secretary to cause Lovejoy's removal or suspension, or take some steps to relieve them from further liability as his sureties.

They find that plaintiff, on 27th May, 28th June, 10th August, and at other times, demanded that Lovejoy should send in his weekly, monthly, and quarterly accounts and reports of moneys received and unaccounted for.

They find that if upon the said facts the law is with the plaintiff, he is entitled to recover $12,937.34.

JUDGMENT.

On the 6th January, 1885, the court entered judgment on the verdict for the whole amount named therein and costs (Rec., pp. 14, 15).

The validity of this judgment is drawn in question by this writ of error.

ERRORS ASSIGNED.

There are six assignments of error in the record (pp. 23, 24).

The first one relates to the constitution of the jury.

Owing to the fact that there was a jury out deliberating in a previous case, and that some of the regular panel had been excused by the court, there were only *seven* jurors of the regular panel left when this case was called for trial, and these seven, owing to challenges on both sides, were reduced to *three*. To make up a jury, then, the court directed the marshal to summon additional persons from the qualified electors of the State (R., pp. 15, 16).

This assignment of error is made in the face of section 804, Revised Statutes, which is as follows:

> When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

Notwithstanding this section empowers the marshal to summon persons from the bystanders to make up a petit jury when "from challenges *or otherwise*" it is necessary, it is said that the law does not cover a case where the defect in the regular panel has been caused by the act of

the court in excusing persons belonging to it, because to give it such a sense would enable a court *to evade* the requirement that jurors shall be drawn from the box by the clerk, and, as in this case, enable the marshal to put ten residents of the same place on the jury.

But the counsel who raises this point seems to forget that it is not to be presumed in this court that a judge holding a commission from the United States would abuse his power in the way suggested.

But the argument that power may be abused, is of no weight whatever in construing constitutions or laws, as a reason for refusing to give the language used in them its fair meaning. It is man's nature to abuse power sometimes; but, nevertheless, the necessity for government demands that power should be conferred, and that society should take the risk of its being occasionally perverted by falling into bad hands.

It is hardly necessary, then, to expend argument upon an objection of this kind.

The next three assignments of error are that the

court "*upon its own motion*" instructed the jury as to the alleged forgery of the name of Thomas W. Means, as surety, and "the legal effect of such alleged forged signature," and as to the alleged erasures, interlineations and additions made to the bond after most of the sureties had executed it, and that the court had so instructed the jury as to give them to understand the court's opinion upon the facts in issue, "thereby tending to influence their action in favor of the defendant in error."

We will take up this last assignment first.

According to the bill of exceptions (R., p. 16), there was evidence tending to show that Means's signature was not genuine.

It is true the court did comment to the jury on the character of this evidence, telling them they might "have some difficulty in finding that it was a forgery," and then pointing out to them some features of the testimony, and saying that, as it appeared to the court, they could not have much difficulty in "coming to a correct conclusion."

But to this was added the following observation of the court: "*Of course it is not my place to express an opinion, or say whether or not I think it* [the signature] *is genuine.* All I say is, that you must examine the matter carefully and fully, and weigh all the testimony that bears on the subject, and if you can say that his signature is a forgery, it is for you to do so." (Rec., p. 16.)

Now, this court has said, time and again, that a judge may do what this judge did without the slightest impropriety—that he may "aid the jury by explaining and commenting upon the testimony, and *even giving them his opinion upon questions of fact,* provided only he submits those questions to their consideration."

U. S. v. *Reading Railroad* (123 U. S. R., 114.)
Vicksburg, etc., R. R. v. *Putnam* (118 *ib.*, 153).
St. Louis, etc., R'lway v. *Vickers* (122 *ib*, 360).
Rucker v. *Wheeler* (127. *ib.*, 93).

The cases cited also furnish a conclusive answer to the second and third assignments of error, namely, that the judge instructed the jury *of his*

own motion. This court has laid down that it is entirely discretionary with a judge to charge the jury both as to the law and the facts in submitting a case to them, and that a State law forbidding judges to express any opinion on the facts does not deprive the federal judges of that power (Vicksburg R. R. Co. *v.* Putnam, *supra*). It is plain, then, that the second and third assignments are as destitute of support as the fourth.

As to what the judge said to the jury about the alterations in the bond, other than the alleged forgery of Means's name, it is unnecessary to discuss it, because, supposing them all to have been made by the Government, they were not of a kind to impair the obligation, in any way.

The fifth assignment of error is that it was error to enter judgment for the United States on the special verdict.

As we have seen (*supra*), the jury find that *every signature to the bond is genuine*, which effectually disposes of every question that rested on the supposition that the name of Thomas W Means was forged.

They find that the names erased in the body of the bond were the names of persons "*that had been repeated and twice written in the body of the bond,*" and, we may add, that these persons were parties to the bond, as appears by the verdict itself.

Surely there is nothing in this part of the verdict to have warranted the court in withholding judgment from the plaintiff. The alterations were entirely immaterial, and, being immaterial, did not impair the bond.

Smith *v.* United States, 2 Wall., 219.
Mersman *v.* Werges, 112 U. S., 139.
Angle *v.* N. W. Mut. L. Ins. Co., 92 U. S., 330.

These cases establish that it is only alterations that change the contract in some material particular that can invalidate it.

The same may be said of the sixth finding, namely, that the signature of C. E. Lovejoy, one of the witnesses to the bond, was a forgery. The signature of Lovejoy was not at all essential to the validity of the bond, and its presence or absence at any stage of the transaction was of no

consequence whatever. It can hardly be necessary, then, to do more than say that the forgery of Lovejoy's name was an immaterial alteration, supposing that one who puts his name on a bond as a witness can be said to be in any sense a party to the obligation.

But it must be remembered that the jury say, as to all these alterations, that neither the time when they were made nor by what hand they were made was shown.

But the point as to the alterations and that as to imputed negligence, both of which are covered by findings in the special verdict, seem to be abandoned by the counsel for the plaintiffs in error.

Certainly, however, it is not necessary to argue that even a surety can derive no advantage over the Government from the negligence of the latter's officials. It is unnecessary to do more than refer to the latest case on this subject, Robertson *v.* Sichel (127 U. S., 507).

As to that part of the answer which amounts to the plea of *non est factum*, we presume that none

of the defendants but him who swore to the answer could make a defense of that description under section 957 Revised Statutes, which would seem to require the defense of *non est factum* to be made under a plea sworn to by the party urging that defense.

It is respectfully submitted that the judgment should be affirmed.

WM. A. MAURY,
Assistant Attorney-General.